89-1734

Supreme Court, U.S.
FILED
MAY 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

Supreme Court of the
United States

Term: October 1989

Thomas V. Cassidy, Appellant-Petitioner,	]	Petition For Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit
-vs-	]	
United States of America, Commissioner of Internal Revenue, Appellee-Respondent.	]	

PETITION FOR WRITE OF CERTIORARI

==========

Appellant-Petitioner,
Pro se.
Thomas V. Cassidy
2648 Sharondale Circle, N.E.
Atlanta, Georgia 30305
404/237-0494

ONE

QUESTIONS PRESENTED FOR REVIEW

I.

In this case the U.S. court of appeals for the 7th circuit has rendered decisions on the same matter in conflict with decisions of another U.S. court of appeal of the eleventh (11th) Judicial Circuit *[887 F.2d 1541 (11th Cir. November 13, 1989)]* and other U.S. Federal courts of the 10th Judicial Circuit *[94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989)]* on the issue of the dischargeability of federal tax penalties and deficiencies *[11 U.S.C., sec. 523 (a) (7) (A) (B)]* associated and related to taxing years which preceded the filing of bankruptcy petitions by more than three (3) years.

II.

In this case the invoking *sua sponte* by the U.S. 7th Circuit court of appeals of a vague, arbitrary and aimless guideline doctrine it calls "judicial estoppel" without *stare decisis* or *precedent* to make a final and ultimate decision of fact, when by the U.S. 7th Circuit court of appeals' own concession that the issue of dischargeability was never "actually litigated" and the taxpayer has never had a trial on the merits of either dischargeability or fraud and that such a finding by the Tax Court is neither "res judicata" or "collateral estoppel" under the law or the Tax Court's Rule 90(f) or F.R.A.P. 36(b) constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and

has decided an important question of the federal law of judicial estoppel which has not been, but should be, settled by this Court.

III.

On March 13, 1984 by final order of the U.S. Bankruptcy court Respondent, Internal Revenue Service, creditor's claim, without its objection or its request to determine dischargeability although ordered to do so by the court, was finally discharged as a matter of law and Respondent was paid all of the disposable distributive assets of the bankrupt's estate. If the contrary is true then Petitioner has been denied his procedural and substantive granted and guaranteed rights of due process by Article V, Const. of the U.S. and the U.S. 7th Circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

TWO

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2. Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987)

3. Judgement and Opinion: U.S. District Court, Central District of Illinois
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4. In Re Cassidy, 892 F.2d 637 (7th Cir. 1990)

FOUR

JURISDICTIONAL GROUNDS STATEMENT

The jurisdiction of this Court is invoked as follows:

(a). January 4, 1990 is the date of the entry of the judgment sought to be reviewed.

(b). February 5, 1990 is the date that the 7th Circuit court of appeals denied Appellant-Petitioner's timely filed FRAP 40 and 7th Circuit Rule 40 Petition For Rehearing.

There are no extensions involved in this appeal.

(c). *28 U.S.C., sec. 2101 (c)* is believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

FIVE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Article V, U.S. Constitution:

> *"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "*

2. 11 U.S.C., sec. 523,(a)(7)(A)(B):

> *(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --*
>
> *(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty --*

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition. (Emphasis added)

3. 11 U.S.C., sec. 727 (a), (b), (c)(1) and (2):

(a) The court shall grant the debtor a discharge . . .

(b) . . . a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order of relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen

before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based upon on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee or creditor may object to discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of the discharge. (Emphasis added)

4. U.S. Tax Court Rule 90(f):

> Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding. (Emphasis added)

SIX

STATEMENT OF THE CASE

The basis for federal jurisdiction in the courts of first instance are:

(1). U.S. Bankruptcy Court for the Central District of Illinois: U.S. BKR. CT. RULE 4007(a); 28 U.S.C., sec. 157(b)(2)(I).

(2). U.S. District Court for the Central District of Illinois: U.S. BKR. CT. RULE 8001(a); 28 U.S.C., sec. 158(a).

(3). U.S. Court of Appeals for the Seventh Circuit: 28 U.S.C., sec. 158(d).

On June 24, 1980 the Appellee-Respondent, United States of America, Commissioner of Internal Revenue (hereinafter referred to as "Internal Revenue Service") sent Appellant-Petitioner, Thomas V. Cassidy (hereinafter referred to as "Cassidy") a

notice of deficiency and additions to taxes for the tax years ending August 31, 1974, and August 31, 1975, in the amounts of $12,865. and $22,028. respectively. The Internal Revenue Service upon its usual and customary practice claimed that all or a part of the underpayment was due to fraud and, pursuant to sec. 6653(b) of the Internal Revenue Code of 1954, assessed civil fraud penalties of $11,774. for 1974 and $11,014. for 1975.

On September 24, 1980 Cassidy filed a petition with the U.S. Tax Court seeking a redetermination only of the deficiencies and additions to tax as determined by Internal Revenue Service.

Cassidy other wise timely filed his tax returns and paid substantial taxes for the years 1974 and 1975.

Before the tax court proceedings came to trial, the First National Bank of

Chicago, Illinois (hereinafter referred to as "1st Bank") filed an involuntary petition in bankruptcy against Cassidy on February 14, 1983, under Chapter 7, 11 U.S.C., sec. 701 et seq. 1st Bank has no interest in this present case or appeal and all of its rights against Cassidy have been fully and finally determined.

In response to 1st Bank's involuntary petition Cassidy immediately filed his motion for summary judgment which the bankruptcy court granted on March 30, 1983 and entered judgment in favor of Cassidy and against 1st Bank.

At this point in time the Internal Revenue Service was in no way involved in the proceedings instituted by 1st Bank and did not know of them.

1st Bank then took an appeal from the March 30, 1983 adverse judgment against it to the U.S. District Court, Central District of Illinois and the

district court, per J. Mihm, reversed the bankruptcy court's March 30, 1983 judgment in favor of Cassidy. Judge Mihm is the same judge who ruled adversely to Cassidy in this proceeding in the court below. (A. 25, 27) Cassidy then filed his notice of appeal to Judge Mihm's adverse ruling and thereby instituted that appeal to the U.S. 7th Circuit court of appeals. Due to the deflowering personal and business effects of all of this on Cassidy, he dismissed his appeal and filed his voluntary petition in bankruptcy on December 2, 1983 and the bankruptcy court entered on that date its Order for Relief pursuant to Cassidy's consent.

December 16, 1983 Cassidy filed his statement of financial affairs and schedules, and listed for the first time Internal Revenue Service's alleged claim.

The Internal Revenue Service was promptly served with process and twelve (12) days later on December 28, 1983 there was filed in the Tax Court by Joel Gerber, Acting Chief Counsel, Internal Revenue Service, a "NOTICE OF PROCEEDING IN BANKRUPTCY" which begins by stating: "The respondent [Internal Revenue Service] notified the Court [Tax] that pursuant to Bankruptcy Code, 11 U.S.C., sec. 362(a)(8), this Court should stay its proceedings with respect to the petitioner Thomas V. Cassidy".

These undisputed facts of record are contrary to what the U.S. 7th Circuit court of appeals states in its opinion Cassidy v. C.I.R., 814 F.2d 477, 479 (7th Cir. 1987):

> "On November 14, 1983, the (Tax) court issued a notice setting the case for trial on January 30, 1984. On January 3,

> 1984, the taxpayer [Cassidy] notified the tax court that he was the subject of an involuntary petition for bankruptcy under chapter 7. This involuntary petition had been filed on February 14, 1983 --almost a year before the taxpayer notified the tax court of its pendency."

After March 30, 1983 there was never pending a 1st Bank involuntary petition in bankruptcy anywhere.

December 22, 1983 the bankruptcy court entered its order setting the first meeting of creditors for January 22, 1984 and March 12, 1984 as the last day for any creditor to file his or its objection to the discharge or any creditor to file his or its complaint to determine dischargeability.

January 22, 1984 no creditors,

including the Internal Revenue Service, appeared for the first meeting of creditors.

March 12, 1984 no creditor, including the Internal Revenue Service, filed an objection to the discharge of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 727(a), and no creditor, including the Internal Revenue Service, filed a complaint to determine the dischargeability of a debt of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 523(c). This was contrary to and in wilful and knowing disobedience, by the Internal Revenue Service, to the bankruptcy court's order of December 22, 1983 in view of the Internal Revenue Service subsequent claim assertion.

March 13, 1984 the bankruptcy court entered its final order of discharge of the debtor, Cassidy, and entered its permanent injunction. 11 U.S.C., sec.

523. Cassidy never has waived the discharge of the alleged debt of the Internal Revenue Service, which would not relieve the Internal Revenue Service of the restraint against an attempt to collect imposed by the permanent injunction.

The bankruptcy court as a part of its final discharge order found:

> . . . that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court . . .

On April 13, 1983 the bankruptcy court entered an order lifting the automatic stay previously in effect so that the tax court proceedings to redetermine only the deficiencies and additions to taxes as determined by the Internal Revenue Service could continue.

January 29, 1986 the bankruptcy

court by its order distributed all disposable assets of the bankrupt's estate to the Internal Revenue Service.

In the tax court proceedings the Internal Revenue Service served upon Cassidy a request for admissions which Cassidy responded to. A dispute arose as to whether Cassidy's response was timely filed within thirty days. The Internal Revenue Service contended it was not and filed its motion for summary judgment predicated upon its theory, only, that the response to its requests were "filed" late and thus "deemed" admitted and that its prior determination of June 24, 1980 was correct as to deficiencies, pre-petition interest, additions to tax and fraud penalties.

The legislatively created Tax Court's jurisdiction is limited only to redetermine the accuracy or wrongness of alleged tax deficiencies.

- In order to preserve his record Cassidy in response to the Internal Revenue Service's motion for summary judgment filed his motion to dismiss averring his March 13, 1984 discharge of the Internal Revenue Service's alleged claim, and Cassidy, further, made his motion pursuant to Tax Court Rules of Practice 90(e) for permission to withdraw and\or modify his deemed admissions. Cassidy asserted that the presentation of the merits of the case would not be subserved thereby and the Internal Revenue Service failed to make any showing or satisfy the tax court that the withdrawal or modification would prejudice it in prosecuting its case or defending its case against Cassidy.

Of course, the tax court Judge denied Cassidy's rule 90(e) request to withdraw or modify his responses and

based on the "deemed" admissions summarily entered judgment in favor of the Internal Revenue Service and against Cassidy.

The tax court then made a finding of fact that Cassidy's reponse to the Internal Revenue Service's request for admissions were not filed within the thirty days after receipt by him, but such responses were filed by Cassidy but that the matters were "deemed" admitted and as such supported the Internal Revenue Service's prior June 24, 1980 notice of deficiencies and additions to taxes and such "deemed" admissions satisfied the Internal Revenue Service's burden of proof of Cassidy's actual intent to defraud.

At what point in time the Internal Revenue Service filed and served its requests to admit upon Cassidy and when they were received by Taxpayer was highly

suspect. The "Filed" or "Received" stamps in the clerk's office of the U.S. Tax Court was missing. As noted by the U.S. 7th Circuit court of appeals in Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987) at pages 477, 478: ***"Taxpayer received Commissioner's request for admissions before date copy was filed with the court . . . ".*** (Emphasis added)

Be that as it may, Cassidy never received a hearing in the tax court on the merits of the Internal Revenue Service's claims and his defenses. Nothing in this regard was ever "actually litigated".

The tax court in summarily ruling for Internal Revenue Service and summarily entering judgment in its favor and against Cassidy on all of Internal Revenue Service's claims defined its jurisdiction as extending only to issues

of redetermining deficiencies and tax additions and its jurisdiction did not extend to determining questions of collection of the tax or bankruptcy discharge. Cassidy v. C.I.R. Service, 51 TCM 784 (1986) at page 786: (A. 271)

> Moreover, the redetermination of an income tax deficiency . . . [by the tax court] . . . has 'nothing to do with collection [or dischargeability in bankruptcy] of the tax nor any similarity to an action for collection of a debt...' Swanson v. Commissioner [Dec. 33,742] 63 TC 1180, 1184 (1976). Accordingly, if there is any question as to the collectability of any income tax deficiencies . . . that question is beyond the jurisdiction of this Court. Graham v. Commissioner [Dec. 37,400], 75 TC 389, 399

(1980). (Emphasis added)

Cassidy then, through his attorney, appealed the tax court judgment against him to the U.S. 7th Circuit court of appeals [Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987)] on the sole issue of the correctness of the redetermination of the Internal Revenue Service's claims and whether a filed "deemed" admission satisfies, without a trial on the merits or the issue not having been "actually litigated", the Internal Revenue Service's burden of proof of actual intent to defraud by the taxpayer.

The U.S. 7th Circuit court of appeals affirmed the tax court and as dictum not necessary to its decision stated that the taxes were not discharged in the bankruptcy court due to Cassidy's fraud although the issues of dischargeability and fraud with actual

intent have never been "actually litigated" or tried on the merits any where in any of the courts below and the Internal Revenue Service, contrary to the bankruptcy court's order of December 22, 1983, never filed any objection to Cassidy's discharge or never filed a complaint to determine dischargeability of its alleged claims against Debtor-Cassidy.

The U.S. 7th Circuit court of appeals in its second Cassidy opinion *[Cassidy II]*, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), concedes that its language in its first Cassidy opinion *[Cassidy I]*, Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987), was dictum and not necessary to its decision in *[Cassidy I]* and that no "deemed" admission by Cassidy in the tax court case can preclude Cassidy from litigating the issue of dischargeability and actual intent to

defraud in the bankruptcy court.

> If this action is barred by earlier litigation, it must be on the strength of this Court's opinion in *Cassidy I*. But for a ruling to have preclusive effect, it must be necessary to the decision. [cites] . . . dicta [is] that portion of an opinion not entitled to the full weight usually given judicial decisions, including any portion not necessary to the outcome of the case. The portion of *Cassidy I* which concerned the dischargeability of the debt was, unfortunately, dicta.
>
> The Court of Appeals exists to review judgments, and consideration of issues outside the scope of the judgment below

must necessarily be dicta, as they cannot possibly be grounds either for approval or disapproval of the lower court's judgment. The Tax Court had no jurisdiction to consider whether Cassidy's tax debt was discharged in bankruptcy. Graham v. CIR, 75 T.C. 389 (1980). Bankruptcy cannot therefore have been grounds for either affirmance or reversal of the Tax Court's order and the *Cassidy I* court's discussion of it cannot have been necessary to its decision. It follows, then that collateral estoppel and res judicata are technically inapplicable to this case.

[Further]... judgments based on stipulated facts have no collateral estoppel effect as to the matters stipulated, especially

stipulations in tax cases. U.S. v. International Building Co., 345 U.S. 502 (1953).

... we hold that a judgment based solely on an admission made under Tax Court Rule 90 (or Fed.R.Civ.P 36) cannot be used to estop re(?)litigation of a factual question in a later proceeding. [*Cassidy II*, pages 640,641.] (Emphasis added)

After this affirmance by the U.S. 7th Circuit court of appeals of the tax court's judgment, Cassidy immediately, through his attorney, based upon the continuing jurisdiction of the bankruptcy court and taking his clues from decisions of various U.S. bankruptcy courts; U.S. Tax Courts; holdings by certain U.S. district courts and U.S. courts of appeals on the questions of res judicata

and collateral estoppel and Tax Court Rule 90(f) and F.R.A.P 36(b) filed his complaint to determine the dischargeability of the Internal Revenue Service's alleged claims in the U.S. Bankruptcy Court for the Central District of Illinois on November 17, 1987.

The Internal Revenue Service responded with a motion to dismiss on December 17, 1987 on the grounds of res judicata citing as its authority ***Cassidy I.*** Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987). On February 2, 1988 the bankruptcy court dismissed Cassidy's complaint to determine the dischargeability of the Internal Revenue Service's alleged claim upon the grounds of res judicata.

Cassidy then, through his attorney, immediately appealed that decision to the U.S. District Court for the Central District of Illinois. The district court

overruled the bankruptcy court's dismissal of Cassidy's complaint to determine dischargeability on the grounds of res judicata, but entered judgment for the Internal Revenue Service on the grounds of collateral estoppel on December 20, 1988.

Cassidy then, through his attorney, immediately appealed the district court's decision and judgment in favor of the Internal Revenue Service to the U.S. 7th Circuit court of appeals.

The U.S. 7th Circuit court of appeals (In Re Cassidy, 892 F.2d 637 (7th Cir. 1990)) in its January 4, 1990 decision and judgment overruled the bankruptcy court's decision and judgment in favor of the Internal Revenue Service on the grounds of res judicata; overruled the U.S. District Court's decision and judgment in favor of the Internal Revenue

Service on the grounds of collateral estoppel; held that its language in Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987) *[Cassidy I]* deciding that Cassidy's alleged tax liabilities were not discharged was not a holding at all but mere dictum and not necessary to its decision in *Cassidy I* and that since the issues of dischargeability of the Internal Revenue Service's bankruptcy claims and the issue of taxpayer's actual intent to defraud had never had a hearing on the merits or had never been "actually litigated" that Cassidy was not precluded by either res judicata or collateral estoppel from litigating these issues of discharge or actual intent to defraud in the bankruptcy court.

Then the U.S. 7th Circuit court of appeals in a pontiff hand washing exercise to get rid of Cassidy adopted its dictum in *Cassidy I* as its holding in

Cassidy II and invoked ***sua sponte*** for the first time in its ninty-four (94) year history, since it was ordained and established by the U.S. Congress in 1896, a doctrine it called "judicial estoppel" in order to affirm the judgment of the U.S. District Court for the Central District of Illinois in favor of the Internal Revenue Service as to Cassidy's complaint to determine dischargeability. [***See prior discussion under STATEMENT OF THE CASE and ARGUMENT et. seq.***]

Throughout it has always been Cassidy's position: 1. that the Internal Revenue Service's alleged claims were discharged in bankruptcy on March 13, 1984; and, 2. that Cassidy having never had a hearing on the merits or there never having been actual litigation on the issues of dischargeability or Cassidy's actual intent to defraud as to

the Internal Revenue Service's alleged claims that he was entitled to such a hearing.

This has never changed.

The Seventh Circuit Court of Appeals holds in ***Cassidy II***, In Re Cassidy, 892 F.2d 637 (7th Cir. 1990), in its invoking of "judicial estoppel" for the first time in its 94 year history at pages 641 and 642:

> Although, this court has never applied the doctrine (judicial estoppel), we have identified certain limitations on its application.
>
> It has been said that judicial estoppel applies only to positions on questions of fact. [cite] Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L. Rev. 1244, 1262 (1986).

We disagree.

> [We've] held that the estoppel may be applied only where a clearly inconsistent position is taken.
>
> A party is not bound to a position it unsuccessfully maintained.

Cassidy, through his attorney, filed his timely Federal Rule of Civil Procedure (Rule) 40 petition for rehearing which was denied by the original panel of judges of the U.S. 7th Circuit court of appeals on February 5, 1990.

Except for this appeal and request for review by writ of certiorari Cassidy has at all times in the court's below been represented by attorneys of record; paid their attorney fees for professional services performed and all costs.

So here we are, Your Honors, on this appeal to the United States Supreme Court with a request for this Court to review: conflicts between U.S. courts of appeal and other federal courts on the same matter; so far a departure by the U.S. 7th Circuit court of appeals from the accepted and usual course of judicial proceedings in invoking a vague, arbitrary and aimless guideline doctrine it terms "judicial estoppel", for the first time in its 94 year history, since established and ordained by Congress in 1896, without guidelines and assurances to prevent arbitrary use which without exception has the effect of turning a citizen out of the court house without a hearing, and which requires this Court's supervision, and additionally presents a question of federal law which has not been and should be decided by this Court; and the denial to Cassidy, and others so

situated, his United States Constitutional granted and guaranteed right to procedural due process and his substantive right of not having his property taken from him without due process of law.

SEVEN

ARGUMENT

I.

In this case the U.S. court of appeals for the 7th circuit has rendered decisions on the same matter in conflict with decisions of another U.S. court of appeal of the eleventh (11th) Judicial Circuit and other U.S. Federal courts of the 10th Judicial Circuit.

The U.S. 7th circuit court of appeals adopting the dictum of its decision in Cassidy v. C.I.R., 814 F.2d 477 (7th Cir. 1987) as its holding in In Re Cassidy, 892 F.2d 637 (7th Cir. 1990) holds as a matter of law in its later decision *[Cassidy II]* that Cassidy's fraud penalties, deficiencies and additions to taxes are not dischargeable pursuant to 11 U.S.C., sec.

523 (a)7(A)(B).

> This subsection allows tax penalties "imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition" to be discharged. 11 U.S.C., sec. 523(a)7)(B).
>
> Because the taxpayer's deficiencies here resulted from fraud, subsection 523(a)(1)(C) renders them nondischargeable. Moreover, subsection 523(a)(7)(A) mandates that fraud penalties are nondischargeable.
>
> (480, 481). *(Emphasis added)*

and the U.S. 7th Circuit court of appeals in *[Cassidy II]* at page 641:

> It follows then, that collateral estoppel and res judicata are technically inapplicable to this case. (*Not "actually litigated",*

no trial on the merits and Tax Court Rule 90(f).)

Nevertheless, we hold (*judicial estoppel*) that Cassidy is barred from relitigating [*NOTE: never "actually litigated"*] the dischargeability of his tax debts. (*NOTE: Not "actually litigated", no trial on the merits and Tax Court Rule 90(f).*) (Emphasis added)

Converse to the 7th Circuit court of appeals in In Re Cassidy, 892 F.2d 637 (7th Cir. 1990) the U.S. 11th Circuit Court of Appeals in In Re Burns, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) discuss, decide and hold as follows:

[Petitioner] Burns contended that the plain language of section 523(a)(7)(B) provides discharge to

penalties relating to a transaction or event occurring more than three years prior to the filing of a bankruptcy petition.

These issues of statutory interpretation arise as ones of first impression in this Circuit.

Since the statute uses the disjunctive [11 U.S.C., sec. 523(a)(7)(a) and (B)], a tax penalty that does not qualify for discharge under one of the two aforementioned circumstances may still qualify under the other.

It is noteworthy that *Cassidy* does not engage in an analysis of the ambiguity, or lack thereof, in section 523(a)(7). Rather, the opinion casts its reliance on a Senate report (with which, for reasons that will be set forth infra, we must respectfully

disagree) without finding the predicate ambiguity for reliance on an extrinsic aid for interpretation.

"There is nothing in the code that says that if penalties do not come within the provisions of subsection (A) they cannot become dischageable within the provisions of subsection (B). Roberts v. Internal Revenue Service, 94 B.R. 707, 709 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989). The use of the disjunctive, without further qualification of either subsection, leaves no doubt that Congress intended to create two independent measures for the dischargeability of tax penalties.

The 7th Circuit court of

appeals in *Cassidy* treated this piece of legislative history as dispositive of the tax penalty dischageability issue. [cite] The fundamental flaw in this reliance lies in the text of the proposed legislation before the committee at that time.

We resolve the question of how to read the legislative history in a simple fashion: by reading the statute and taking it at face value.

Thus, as the Supreme Court has counseled in Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986) and other cases, in light of the compromises and changes, we can effect the will of Congress only by giving effect to the words of the statute.

> For the foregoing reasons, the decision of the district court on the issue of tax penalties is AFFIRMED; to wit, a tax penalty is discharged if the tax to which it is related is discharged or if the transaction or event giving rise to the penalty occurred more than three years prior to filing of the bankruptcy petition and tax fraud penalties associated with taxing years which preceded the filing of prior bankruptcy petition by more than three years were dischargeable. *(Emphasis added)* (Pages: 1541, 1542, 1543, 1544, 1545, 1546, 1551 and 1552)

The Internal Revenue Service In Re Burns, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) never petitioned the U.S. 11th Circuit court of appeals for a rehearing

either under F.R.A.P 40 or 35(b) and did not seek a review to this Court by writ of certiorari. 28 U.S.C., sec. 2101(c). If this does not amount to a judicial admission by the Internal Revenue Service it is a practical admission by the Service that a conflict on the same matter exists between United States courts of appeal and that the Internal Revenue Service positions as to 11 U.S.C., secs. 523(a)(7)(A)(B) are wrong.

Converse, also, to the 7th Circuit court of appeals in In Re Cassidy, 892 F.2d 637 (7th Cir. 1990) these United States federal courts have held with In Re Burns, 887 F.2d 1541 (11th Cir. Nov. 13, 1989) on the same matter, namely, Roberts v. Internal Revenue Service, 94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989).

Both the United States Bankruptcy Court and District Court for the Northern District of Oklahoma rejected the U.S. 7th Circuit court of appeals in ***Cassidy***:

> The second exception (subsection B) [11 U.S.C., sec. 523(a)(7)(B)] to the general nondischargeability rule does clearly apply and does make the penalties in the instant case dischargeable. This subsection states without ambiguity or equivocation that penalties on taxes that are over three years old are dischargeable. Plain and simple.
>
> In the instant case the penalties in question clearly refer to transactions or events that happened more than three years prior to the filing of the

> petition and are therefore covered by subsection (B) and are dischargeable. (Emphasis added)

Upon his best information and belief Cassidy represents to this Court that Roberts v. Internal Revenue Service, 94 B.R. 707 (Bankr. N.D. Okla. 1989) affirmed on appeal (B. Okla. No. 89-C-46-B 1989) is presently on appeal to the U.S. 11th Circuit Court Of Appeals.

At no level in this case has Cassidy ever received on the issue of dischargebility a hearing or trial on the merits or has he been afforded to have had "actually litigated" this ultimate question of fact of dischargeability and fraud notwithstanding he has consistently and repeatedly asked for it as he again does, if, in fact, the three year older than petition-filing alleged tax liabilities are not as a matter of law discharged.

II.

In this case the invoking *sua sponte* by the U.S. 7th Circuit court of appeals of a vague, arbitrary and aimless guideline doctrine it calls "judicial estoppel" without *stare decisis* or *precedent* to make a final and ultimate decision of fact, when by the U.S. 7th Circuit court of appeals' own concession that the issue of dischargeability was never "actually litigated" and the taxpayer has never had a trial on the merits of either dischargeability or fraud and that such a finding by the Tax Court is neither "res judicata" or "collateral estoppel" under the law or the Tax Court's Rule 90(f) or F.R.A.P. 36(b) constitutes so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of

this Court's power of supervision, and has decided an important question of the federal law of judicial estoppel which has not been, but should be, settled by this Court.

This Argument, Point II, which is also the Second Question Presented For Review (Petition, pages 2 & 3, supra) is thoroughly discussed with citations by Cassidy-Petitioner on page 28 through 37 of Petition, SIX; STATEMENT OF THE CASE and will not again be covered.

However, these two (2) additions:

1. This Court's decision in Brown v. Felson, 442 U.S. 127, pp. 131 thru 139 (1979) is here relevant and material on the Constitutional need of the bankruptcy court to conduct hearings on the merits and to "actually litigate" ultimate issues; and,

2. It is now improper and without

legal basis to look back to the Tax Court proceedings and to penalize a party and deny him a hearing concerning substantial tax debts and penalties in the court of proper jurisdiction -- the bankruptcy court. The doctrine of "judicial estoppel" when properly invoked is based upon the proposition of preventing inconsistencies within the courts, which is not the case here. It is not a penal doctrine as the U.S. 7th Circuit court of appeals here applies it.

III.

On March 13, 1984 by final order of the U.S. Bankruptcy court Respondent, Internal Revenue Service, creditor's claim, without its objection or its request to determine dischargeability although ordered to do so by the court, was finally discharged as a matter of law

and Respondent was paid all of the disposable distributive assets of the bankrupt's estate. If the contrary is true then Petitioner has been denied his procedural and substantive granted and guaranteed rights of due process by Article V, Const. of the U.S. and the U.S. 7th Circuit court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

With a regard to antecedent matters of fact concerning 1st Bank and its dismissed involuntary petition against Cassidy discussed on pages 15, 16 and 17 of this Petition, SIX, STATEMENT OF THE CASE, Cassidy filed his voluntary petition in bankruptcy on December 2, 1983 and the bankruptcy court entered on that date its Order for Relief pursuant

to Cassidy's consent.

December 16, 1983 Cassidy filed his statement of financial affairs and schedules, and listed for the first time Internal Revenue Service's alleged claim. The Internal Revenue Service was promptly served with process and twelve (12) days later on December 28, 1983 there was filed in the Tax Court by Joel Gerber, Acting Chief Counsel, Internal Revenue Service, a "NOTICE OF PROCEEDING IN BANKRUPTCY" which begins by stating: "The respondent [Internal Revenue Service] notified the Court [Tax] that pursuant to Bankruptcy Code, 11 U.S.C., sec. 362(a)(8), this Court should stay its proceedings with respect to the petitioner Thomas V. Cassidy".

After March 30, 1983 there was never pending a 1st Bank involuntary petition in bankruptcy anywhere.

December 22, 1983 the bankruptcy court entered its order setting the first meeting of creditors for January 22, 1984 and March 12, 1984 as the last day for any creditor to file his or its objection to the discharge or any creditor to file his or its complaint to determine dischargeability.

January 22, 1984 no creditors, including the Internal Revenue Service, appeared for the first meeting of creditors.

March 12, 1984 no creditor, including the Internal Revenue Service, filed an objection to the discharge of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 727(a), and no creditor, including the Internal Revenue Service, filed a complaint to determine the dischargeability of a debt of the debtor [Cassidy] pursuant to 11 U.S.C., sec. 523(c). This was contrary to and in

wilful and knowing disobedience, by the Internal Revenue Service, to the bankruptcy court's order of December 22, 1983 in view of the Internal Revenue Service subsequent claim assertion.

March 13, 1984 the bankruptcy court entered its final order of discharge of the debtor, Cassidy, and entered its permanent injunction. 11 U.S.C., sec. 523. Cassidy never has waived the discharge of the alleged debt of the Internal Revenue Service, which would not relieve the Internal Revenue Service of the restraint against an attempt to collect imposed by the permanent injunction.

The bankruptcy court as a part of its final discharge order found:

> . . . that no complaint objecting to the discharge of the debtor was filed within the time fixed by the

court . . .

January 29, 1986 the bankruptcy court by its order distributed all disposable assets of the bankrupt's estate to the Internal Revenue Service.

The bankruptcy court's March 13, 1984 final judgment of discharge in favor of Cassidy and against the Internal Revenue Service became final on April 12, 1984. The Internal Revenue Service took no appeal to the United States District Court for the Central District of Illinois within the allotted time to stay the finality of the March 13, 1984 final judgment of discharge.

It was not until after the discharge judgment became final on April 12, 1984 that the Internal Revenue Service on April 13, 1984 received permission from the bankruptcy court and relief from its permanent stay order, which was a part of the final discharge judgment, to proceed

in the Tax Court for the singular and only purpose of determining the accuracy or error of its June 24, 1980 notice of alleged deficiencies and additions to taxes for the tax years of 1974 and 1975.

This action by the Internal Revenue Service did not stay the finality of the March 13, 1984 discharge judgment in favor of Cassidy.

The Internal Revenue Service's alleged claims are discharged as a matter of law. If not than due process as granted and guaranteed by the United States Constitution means nothing.

The U.S. 7th Circuit court of appeals has so far departed from this accepted legal principle in the course of these judicial proceedings as to call for an exercise of this Court's power of supervision.

****

Appellant-Petitioner Thomas V. Cassidy, pro se, requests that the writ issue.

Respectfully submitted,

THOMAS V. CASSIDY, Pro se.
Appellant-Petitioner on
Petition for writ of
certiorari.

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May 6, 1990